SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. [redacted] 538

ALICE L. MILLER, *Respondent,*

v.

DR. ROBERT B. MILLER, *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 6365

ALICE L. MILLER,

Respondent,

v.

DR. ROBERT B. MILLER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT.

Dr. Robert B. Miller, petitioner herein, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Connecticut entered May 6th, 1969; announced May 20, 1969; motion to reargue denied June 4th, 1969 affirming the judgment of the Superior Court, for Middlesex County, at Middletown reversing the judgment of the Probate Court rendered on December 7th, 1967 which removed Alice L. Miller as guardian of two minor children.

OPINION BELOW.

The opinion of the Supreme Court is reported at 158 Conn. (30 Conn. L.J. No. 47 p. 5) and appears in Appendix A-1, Motion to Reargue, Appendix B-1 and denial of Motion to Reargue Appendix B-2..

JURISDICTION.

The final judgment of the Supreme Court of the State of Connecticut, was entered on June 6th, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3); 28 U.S.C. §1738. The constitutional question was originally raised in the trial court (R 23) and was assigned as error (R. 42) to the Supreme Court, State of Connecticut, which ruled specifically thereon (infra Appendix A-1, B-1, and B-2).

QUESTION PRESENTED.

The Courts of the State of Connecticut are bound to give the judgment of a sister state the same force and effect as it is entitled to in that sister state. The Full Faith and Credit Clause if applicable to custody decrees would require a state to recognize a sister state's decree only if the sister state would be bound by it. The child's welfare in a custody case has such a claim upon the state that judicial responsibility is obviously not to be foreclosed by strict adversary and constitutional concepts.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved in Article IV, Section 1.

STATEMENT OF THE CASE.

(Page references are to Transcript) (T)

ALICE L. MILLER

During the period November, 1965 to February 9, 1966, the respondent denied drinking alcohol (p. 27). From February to June, 1966, Mrs. Miller denied drinking alcohol (p. 27). During June, 1966 she denied drinking alcohol (p. 27-28); however, on May 31, 1966, the respondent was admitted to St. Vincent's Hospital of Westchester with the following final diagnosis: "acute brain syndrome associated with alcoholic intoxication. Nephrotic syndrome due to undetermined cause" (p. 52, p. 86). Yet Mrs. Miller stated that she did not drink to excess and that she gets sick before she gets drunk. As late as July, 1967, she was treated with Librium (p. 77). Mrs. Miller admitted that she had auditory hallucinations and told the doctor about them (p. 114).

E. CLAYTON PITTS, JR.

Mr. Pitts stated Alice Miller worked for him as an administrative assistant (p. 131); that he had seen Mrs. Miller fairly high on one occasion (p. 131-132);

he found Mrs. Miller particularly chic and quite a physical adornment to his office.

ANDREA JOAN MILLER

Andrea J. Miller stated her mother was a heavy drinker (p. 143); that she saw her intoxicated (p. 143); that Alice Miller hid the liquor bottles (p. 145); that Mr. Whelan slept with her mother (p. 146); that her mother struck her with a stick; that she considers Shirley Miller her mother (p. 149); that she chooses to live with her father (p. 149); that she is happy living where she is (p. 150).

NICHOLAS ROBERT MILLER

Nicholas Robert Miller stated that he is eleven years old (p. 186); that Shirley Miller is like his mother (p. 188); that the respondent took him out of school to New York (p. 189); that upon arrival in New York Alice Miller mixed a gin and Tang for herself and a Mr. Whelan (p. 189); Nicholas Miller asked Mrs. Bjelovucic to call his father because he wanted to live with his father (p. 193); his uncle put him on the train and his father picked him up in New Haven (p. 193).

Nicholas was then instructed not to testify as to anything that happened before February, 1966 (p. 194) over counsel's objection (p. 196-199).

Nicholas testified a Mr. Whelan slept at the house in his mother's double bed (p. 195); Mr. Whelan and Mrs. Alice Miller had too much to drink from time to time (p. 196).

Nicholas stated he wished to live with his father (p. 201).

Nicholas stated that his mother hit him with a high heeled shoe (p. 222); he was struck at other times for various reasons including not liking the food (p. 224). Nicholas has not been going to church regularly (p. 234). His father permits him to write to his mother (p. 238); Andrea went to stay with Aunt Regis because her mother was beating her so much (p. 294).

DR. J. E. ROSENFELD

Dr. Rosenfeld stated that he specialized in alcohol dependence problems; he stated that acute brain syndrome associated with alcoholic intoxication implies that there was an organic damage to the brain at the moment presenting the acute sydrome which is produced when alcohol is excessively taken into the body (p. 248). The doctor also defined psychosis (p. 249), visual hallucinations (p. 249); tactile hallucinations (p. 249); confabulating (p. 250) and these symptoms are associated with alcoholism (p. 250); a denial of excessive drinking by a person characterized as an alcoholic is a symptom of alcoholism (p. 262); the symptoms go way beyond alcoholic intoxication (p. 273); they describe a condition known as alcoholism (p. 273); the symptoms describe acute alcoholism (p. 273).

SHIRLEY MILLER

Shirley Miller stated Dr. Miller, the petitioner, is

her husband and she resides with him (p. 276); her occupation is a teacher (p. 276); she treats the children as her own (p. 277); she was prevented by Alice Miller from exercising visitation rights (p. 282); the children call her mom.

HELEN FORST

Helen Forst stated that she was the director of the Social Service Department of The Connecticut Valley Hospital (p. 299); that she visited the Millers (Dr. and Mrs. Shirley Miller) in their household, and it was a very relaxable, happy pleasant household (p. 301); to her observation the children seemed happy (p. 303).

DR. ROBERT B. MILLER

Dr. Robert B. Miller stated he is chief of professional services at The Connecticut Valley Hospital; that he is married to Shirley Miller (p. 305); that Nicholas Miller and Andrea Miller came to live with him in June of 1966 (p. 306); when the children came to live with him they showed evidence of tension, anxiety, skinny, upset and underweight (p. 307); the children are now extremely happy, relaxed (p. 308); he has never coerced the children to testify (p. 310); he told the children they should continue to go to church but he would not coerce them (p. 312); he did not enforce his visitation rights because it became obvious it was not in the children's best interests (p. 333); that Alice Miller is extremely sick with a disease called systemic lupus erythematosus, which is an irreversible gradually progres-

sive ultimately fatal disease characterized occasionally by brief periods of remission (p. 337); alcohol is specifically contraindicated in renal lupus erythematosus (p. 350); Mrs. Miller's brother visited Dr. Miller in Middletown (p. 351).

Counsel for the petitioner were prohibited from introducing evidence as to the fitness of the respondent prior to February 9th, 1966.

The Trial Court found that:

"By consent decrees of the Supreme Court of the State of New York, the last of which was dated February 9th, 1966, custody of the children was continued in the respondent. It follows that until February 9th, 1966, the petitioner agreed that the respondent was a proper person to have custody. **If she, the respondent, was qualified to have custody, she necessarily must have been a proper guardian** (emphasis supplied). The question then is whether the respondent became unfit to continue as a joint guardian."

The Supreme Court of Connecticut held "a petition to modify a custody decree can not be considered on the merits in the absence of an affirmative showing that there has been such a material change in circumstances since the last effective custody decree as would justify a change in the award of custody." Appendix A. The Supreme Court of Connecticut further stated, "Therefore, the Trial Court was correct in holding that the Probate Court committed error by not recognizing the New York cus-

tody decree under the Full Faith and Credit Clause of the United States Constitution". Appendix A.

The petitioner assigned as error the following among other assignments of error:

1. In finding that the Probate Court could legally base its determination only upon a finding of a material change in facts and circumstances since the last decree of the Supreme Court of New York on February 9th, 1966, as the law of the case during the trial. (Paragraph 38 of the Finding)

2. In refusing to find the Probate Court could lawfully consider facts and circumstances long prior to February 9th, 1966. (Paragraph 39 of the Finding)

3. In finding the respondent does not have an acute brain syndrome associated with alcoholic intoxication. (Paragraph 47 of the Finding)

4. In concluding, "The Probate Court, and this court on appeal from the Probate Court, are limited to a consideration of any material change in the facts and circumstances since February 9th, 1966, the date of the last consent decree of the Supreme Court of New York, which decree continued the custody of the children in the respondent." (Paragraph 74 of the Finding)

5. In concluding, "The respondent was a fit person to be the guardian of the children as of February 9th, 1966, the date of the consent decree continuing

the children in the custody of the respondent." (Paragraph 75 of the Finding)

6. In overruling petitioner's claim of law "whether the Full Faith and Credit Clause of the United States Constitution applies to custody decrees."

The petitioner argued at length before the Connecticut Supreme Court the following:

1. The Full Faith and Credit Clause, if applicable to custody decrees, would require a sister state to recognize a sister state's decree only if the sister state would be bound by it.

2. In the **Ford** case cited below, this Court held the Courts of South Carolina were not precluded by the Full Faith and Credit Clause as to what is for the best interests of the children and entering a decree accordingly.

In New York, the Full Faith and Credit Clause does not apply to custody decrees.

The child's welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibiilty at another time.

The Court is charged with the duty to do what is necessarily in the best interests of the children, mindful of their welfare and health, and without being restricted by an agreement made by adults and to which the children were not parties.

REASONS FOR GRANTING WRIT.

The holding of the Court below relegates the rights of children to a position equal to personal claims and property. This Court has consistently held that "children have a very special place in life which law should reflect".

May v. Anderson, 345 U.S. 528 at 536.

To dismiss summarily without comment, **May v. Anderson, 345 U.S. 528; Ford v. Ford, 371 U.S. 187, 83 S. Ct. 273; Matter of Bachman v. Mejias, 1 N.Y. 2d 575** and hold it is not error to refuse to admit evidence of transactions and occurrences which happened before the entry of the last New York custody decree when the Probate Court went behind the New York consent custody decree (Appendix A-1) is to "strain out a gnat, and swallow a camel." Matthew XXIII (24)

POINT I.

CONNECTICUT COURTS ARE BOUND BY FULL FAITH AND CREDIT CLAUSE TO GIVE NEW YORK JUDGMENT THE SAME FORCE AND EFFECT AS IT IS ENTITLED TO IN NEW YORK.

The Courts of the State of Connecticut are bound to give to the judgment of a sister state the same force and effect as it is entitled to in that sister state.

U. S. Constitution Art. IV Sec. 1

Ogles v. Warren, 148 Conn. 255, 170 Atl 2d 140

The Full Faith and Credit Clause, **if applicable to custody** decrees would require a state to recognize a sister state's decree only if the sister state would be bound by it.

Ford v. Ford, 371 U.S. 187, 83 S. Ct. 273

Further, in the **Ford case,** the Supreme Court held the Courts of South Carolina were not precluded by the Full Faith and Credit Clause from determining what is for the best interest of the children and entering a decree accordingly.

Ford v. Ford, 371 U.S. 187, 83 S. Ct. 273

In New York the Full Faith and Credit Clause does not apply to custody decrees

Matter of Bachman v. Mejias, 1 N Y. 2d 575

The case upon which the appellee relies so heavily is not the law of New York. This very point was briefed and argued in the New York Court of Appeals. **Freund v. Burns, 131 Conn. 380** was cited by the respondent and rejected by the Court.

See **Official Reports 1 N.Y.2d 575,** where appellant states "The New York Courts as a matter of comity and reciprocity, should permit the custody proceedings to be finally decided by the Puerto Rican Court in which it is now pending, and should give effect to the orders of the Puerto Rican Court whose jurisdiction was invoked by the wife herself". This argument was clearly rejected in the New York Court of Appeals.

"Interests of a state other than in its duty towards

children may also prevail over the interest of national unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time."

May v. Anderson, 345 U. S. 528, 535-536.

We have in evidence a hospital record with a final diagnosis: acute brain syndrome associated with alcoholic intoxication, nephrotic syndrome due to undetermined cause.

"Although the basic requirement that proof may be received only in compliance with the rules of evidence ordinarily applies with equal force to habeas corpus proceedings, where the welfare of children is concerned and in furtherance of the duty of the state as parens patriae, courts are not so hide-bound or limited that they may not depart from strict adversary concepts."

People ex rel Fields v. Kaufman, 9 App. Div. 2d 375; First Dept. Dec. 15, 1959.

See Use of Extra Record Information in Custody Cases, The University of Chicago Law Review Vol. 24 (1956) pg. 349.

A Mexican divorce decree obtained by the parties will not necessarily be controlling on this Court or a New York court for it is the duty of the Court to determine custody solely on the basis of the welfare of

the minors citing **Matter of Bachman v. Mejias, 1 N.Y. 2d 575.**

Furthermore, neither is the separation agreement determinative of the disposition to be made of custody. The court is charged with the duty to do what is necessarily in the best interest of the children, mindful of their welfare and health, and without being restricted by an agreement made by adults and to which the children were not parties.

Harris v. Harris, 57 Misc. 2d 672, Supreme Court, Dutchess County, August 29, 1968.

POINT II.

THE FULL FAITH AND CREDIT CLAUSE DOES NOT APPLY TO CUSTODY DECREES IN NEW YORK AND IN THIS CASE CONNECTICUT IS BOUND BY THE NEW YORK LAW.

In matter of **Bachman v. Mejias, 1 N.Y. 2d 575,** Petitioner father and respondent mother were divorced in Puerto Rico, and pursuant to a stipulation incorporated in a Puerto Rican decree of divorce, the temporary custody of the infant son was granted to his paternal grandparents. The divorce decree gave to the mother the patria potestas over the son and two other children. An order of the Puerto Rico Court authorized the mother to leave the son in the custody of the grandparents in Puerto Rico during the school year with the understanding that he would be sent to live with the mother at her New York City residence during the vacation period in every year. The grandfather guaranteed the pay-

ments of support. After some noncompliance with the order of the Puerto Rico Court, the mother filed a motion requesting an order approving the exercise of her patria potestas. The Puerto Rico Court without a hearing commanded the return of the son to the grandfather pending readjudication of the custody issue but the mother returned to New York before the order could be served upon her. Special Term awarded custody to the mother, the Appellate Division reversed, the Court of Appeals reversed the Appellate Division and reinstated the Special Term Decision.

The Court of Appeals in sustaining the theory that the full faith and credit doctrine does not apply to custody decrees stated the following: "The full faith and credit clause does not apply to custody decrees (citing cases). In **May v. Anderson (345 U.S. 528)** Mr. Justice Frankfurter stated in a concurring opinion:

"The full faith and credit clause does not require Ohio, in disposing of the custody of children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin. Interests of a state other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit clause. But the child's welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time. **(345 U.S. 528)**".

The Court of Appeals further stated, "a child is

not a chattel which may be used as a consideration for an agreement of compromise. The child's rights are superior to the rights of the parties to a stipulation and an order approving a stipulation."

Matter of Bachman v. Mejias, 1 N.Y. 2d 575.

POINT III.

THE COURT ERRED IN LIMITING THE PROOF OF FACTS TO THOSE SUBSEQUENT TO FEBRUARY 9th, 1966.

Assuming arguendo that full faith and credit must be given in each state to the judicial proceedings of every other state.

Constitution, U. S. Art. IV Section 1;

Morrill v. Morrill, 83 Conn. 479, 77 A.1

And assuming further that a state must give to the judgment of a sister state only the force and effect to which it is entitled in the state where it was rendered.

Haddock v. Haddock, 201 U.S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1

It follows therefore that if the Court of the original State has authority at its discretion to modify the decree at any time, even in the absence of a change in circumstances, the Courts of another state have a like power.

Sistare v. Sistare, 218 U.S. 1, 30 S. Ct. 682, 54 L.Ed. 905, 28 L.R.A.N.S., 1068, 20 Ann. Cas. 1061

The right of custody has never been an absolute right which could be bargained away.

Johnson v. Terry, 34 Conn. 259

The February 9th, 1966 evidentiary limitation was in error as it is not the law of New York, this is the law that should be applied here and is the law which the Probate Court applied.

See Point II herein.

The full faith and credit clause does not apply to custody decrees although we assumed it arguendo supra.

Matter of Bull (Hellman), 266 App. Div. 290, affd. 291 N.Y. 792.

See **May v. Anderson, 345 U.S. 528** wherein Mr. Justice Frankfurter said, "The full faith and credit clause does not require Ohio, in disposing of the custody of children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin. * * * Interest of a state other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time".

May v. Anderson, 345 U.S. 528, at 535-536.

It is the duty of the New York Supreme Court and consequently the Connecticut Superior Court to de-

termine the custody of minor children in this state and such determination is to be based solely on the welfare of the minor. The responsibility for the welfare of infants endows the Court with the power to determine custody irrespective of the residence and domicile of the parents and prior custody orders in a foreign jurisdiction.

People ex rel Herzog v. Morgan, 287 N.Y. 317;

People ex rel Allen v. Allen, 105 N.Y. 628.

It is the duty of the Court to make a complete inquiry as to the fitness of the parents and not to limit counsel's attempt to probe into all of the facts.

It has been indicated that in such proceedings as the one before the Trial Court, family counseling unit reports, psychiatric, psychological and social welfare reports may be admitted into evidence.

People ex rel Fields v. Kaufman, 9 App. Div. 2d 375

Where the welfare of children is concerned and in furtherance of the duty of the state as parens patriae, courts are not so hide bound or limited that they may not depart from strict adversary concepts.

See "Use of Extra-Record Information in Custody Cases".
The University of Chicago Law Review Vol 24 (1956).

The paramount obligation of the Courts is to provide such custody as under the circumstances will

best protect and preserve the health, welfare, education and well-being of the children.

People ex rel Fields v. Kaufman, 9 App. Div. 2d 375

As was stated by Mr. Justice Frankfurter in **Kovacs v. Brewer, 356 U.S. at page 609 et seq:**

"At stake in this case is the welfare of a child. More immediately, the question before us is what restriction, if any, does the Constitution of the United States impose on a state Court when it is determining the custody of a child before it. . . Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature."

In short, both the underlying purpose of the Full Faith and Credit Clause and the nature of the decrees militate strongly against a constitutionally enforced requirement of respect to foreign custody decrees. New York itself, the State for whose decree full faith and credit is here demanded, has rejected the applicability of that requirement to custody decrees. See, e. g. **Bachman v. Mejias, 1 N.Y. 2d 575, 580, 136 N.E. 2d 866, 868 (1956)**; ("The full faith and credit clause does not apply to custody decrees"); **New York ex rel. Herzog v. Morgan, 287 N.Y. 317, 320, 39 N.E. 2d 255, 256 (1942)**; **New York ex rel. Allen v. Allen, supra**; **Hicks v. Bridges, 2 App Div. 2d 335, 339, 155 N.Y.S. 2d 746, 751 (1956)**; **New York ex rel. Kniffin v. Knight, 184 Misc. 545, 550, 56 N.Y.S. 2d 108, 113 (1945)**. And writers on the subject have observed a marked ten-

dency among other state courts to arrive at this same conclusion, although often spelling out their judgments in traditional terms."

The Connecticut Court did not apply or consider the controlling New York law.

CONCLUSION.

In conclusion, we respectfully urge this Court to grant this petition for the reason that the Full Faith and Credit Clause of the Constitution was improperly applied by the Connecticut Court, for although a divorce decree was granted in a foreign state, this will not prevent a Court from modifying the decree if the child involved is a resident of the State, and if such modification is necessary for the welfare of the child.

Respectfully submitted,

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APPENDIX A-1

Date of Supreme
Court Judgment
May 6, 1969
Decision
Announced
May 20, 1969

SUPREME COURT

April Term, 1969

Alice L. Miller v. Robert B. Miller

Appeal by the plaintiff from a decree of the Probate Court for the district of Middletown awarding the sole guardianship of two minor children to the defendant, brought to the Superior Court in Middlesex County and tried to the court, **Palmer, J.**; judgment sustaining the appeal, from which the defendant appealed to this court. **No error.**

James F. Bingham, for the appellant (defendant).

Jack Stock, with whom was **Edward R. Karazin, Jr.,** for the appellee (plaintiff).

Thim, J. The defendant has appealed from a judgment of the Superior Court which reversed a decision of the Probate Court for the district of Middletown appointing him the sole guardian of his two adopted, minor children. He claims that the Superior Court committed error by according full faith and credit to a New York custody decree and

by excluding evidence of occurrences and events which happened prior to the rendition of the New York custody decree. Furthermore, the defendant claims error in the court's refusal to allow the children to choose their own guardian, in refusing to admit all of the evidence which was considered by the Probate Court, and in concluding that the Probate Court abused its legal discretion by appointing him sole guardian.

The defendant has extensively attacked the finding. Facts which he asks us to include in the finding cannot be added since they are neither admitted nor undisputed, and the defendant's effort to strike various facts found must fail since they have reasonable support in the evidence. Practice Book § 628. Thus, the finding is not subject to correction.

The plaintiff and the defendant were married in Florida in February, 1943. They have no natural children of their marriage, but they do have two adopted, minor children. In April, 1961, the parties executed a separation agreement which provided that legal custody of the two children would be in the plaintiff with rights of visitation in the defendant. Upon petition of the defendant, a divorce decree was entered in the First Civil Court of Bravos District, State of Chihuahua, Republic of Mexico in May, 1961. The divorce decree approved the separation agreement which had been executed by the parties and awarded custody of the two adopted children to the plaintiff.

Shortly after the rendition of the Mexican divorce, the defendant remarried, and the two children con-

tinued to live with the plaintiff in New York City. In June, 1962, the Supreme Court of New York, in a habeas corpus proceeding, granted the defendant certain rights of visitation and, in April, 1963, and February, 1966, the Supreme Court of New York entered orders continuing custody of the children in the plaintiff.

In October, 1964, the defendant moved to Middletown, Connecticut. He wrote to the plaintiff in May, 1966, to arrange to have the children visit him in Connecticut. At that time, the plaintiff was in the hospital, and her brother, who was then caring for the two children, arranged to have them visit the defendant during the summer.

Shortly after she returned from the hospital, the plaintiff notified the defendant that he could keep the children until her health improved. On September 8, 1966, the plaintiff telegraphed the defendant and requested that he return the children to New York as soon as possible since the hospital had informed her that she was able to care for the children. The defendant refused to return the children, and, shortly thereafter, he commenced proceedings in the Probate Court of Middletown to remove the plaintiff as a joint guardian of the children and to have himself appointed their sole guardian. After a hearing which lasted several days, the Probate Court appointed the defendant sole guardian of the children. The plaintiff appealed from the decision of the Probate Court to the Superior Court, which reversed the decision of the Probate Court.

I

The defendant's principal claim on this appeal is that the Superior Court committed error by according full faith and credit to the New York decree which awarded custody of the children to the plaintiff. The defendant requested the Probate Court to appoint him sole guardian of the two children and to remove the plaintiff as their joint guardian. A guardian of the person is entitled to the custody of his ward; therefore, the proceedings in the Probate Court relating to guardianship necessarily involved the issue of custody. **Boardman v. Boardman, 135 Conn. 124, 129, 62 A.2d 521; LaBella v. LaBella, 134 Conn. 312, 316, 317, 57 A.2d 627; Macready v. Wilcox, 33 Conn. 321, 328.** Thus, the order of the Probate Court appointing the defendant sole guardian purported to transfer sole custody of the children to him in complete disregard of the plaintiff's right to custody which had been granted to her by the New York decree.

Although there is a conflict of authority on the question whether full faith and credit must be given to custody decrees rendered by other states; note, 4 A.L.R.3d 1277, 1289-1302 §§ 4-6; note, 4 A.L.R.2d 7, 41 § 24; it is settled in Connecticut that a custody decree rendered by a sister state is entitled to full faith and credit provided that the court which rendered the decree had jurisdiction. **Ogles v. Warren, 148 Conn. 255, 257, 258, 170 A.2d 140; Scott v. Furrow, 141 Conn. 113, 120, 104 A.2d 224; Boardman v. Boardman, supra, 137, 138; Freund v. Burns, 131 Conn. 380, 383-385, 40 A.2d 754;** see **Baram v. Schwartz, 151 Conn. 315, 318, 197 A.2d 334.** A for-

eign custody decree can be modified in Connecticut for the same reasons that the decree could be modified in the state wherein it was rendered. **Morrill v. Morrill, 83 Conn. 479, 492, 77 A.1.** Hence, before the Probate Court can modify a New York custody decree, it must determine whether the requested modification of the decree would be permissible under New York law. See **Nowell v. Nowell, 157 Conn.** (30 Conn. L.J., No. 33, pp. 19, 20).

In New York, decisions involving custody of children of divorced parents may constitute res judicata. **Matter of Lee, 220 N.Y. 532, 538, 116 N.E. 352; People ex rel. Hahn v. Haines, 1 App. Div. 2d 263, 267, 149 N.Y.S.2d 407, aff'd, 1 N.Y.2d 835, 135** N.E.2d 723; **People ex rel. Glendening v. Glendening, 259 App. Div. 384, 387, 19 N.Y.S.2d 693; Matter of Jackson v. Woodner, 19 Misc. 2d 594, 597, 159 N.Y.S.2d 578.** Although the New York court has continuing jurisdiction to modify a judgment of divorce with respect to the custody of children; **Joffe v. Spector, 27 App. Div. 2d 406, 408, 279 N.Y.S.2d 905; Seidenberg v. Seidenberg, 19 App. Div. 2d 676, 241 N.Y.S.2d 6;** N.Y. Domestic Relations Law §240; a petition to modify a custody decree cannot be considered on the merits in the absence of an affirmative showing that there has been such a material change in circumstances since the last effective custody decree as would justify a change in the award of custody. **Matter of Metz v. Morley, 29 App. Div. 2d 462, 464, 289 N.Y.S.2d 364; People ex rel. Foussier v. Uzielli, 23 App. Div. 2d 260, 263, 260 N.Y.S.2d 329, aff'd, 16 N.Y.2d 1057, 213 N.E.2d 460; People ex rel. Yaklin v. Yaklin, 19 App. Div. 2d 405, 407, 243**

N.Y.S.2d 775; Shakun v. Shakun, 11 App. Div. 2d 724, 725, 204 N.Y.S.2d 694; People ex rel Scanlon v. Ciaravalli, 2 App. Div. 2d 702, 152 N.Y.S.2d 494; People ex rel. Hahn v. Haines, supra, 268; Housman v. Housman, 285 App. Div. 1012, 1013, 139 N.Y.S.2d 24; People ex rel. Brussel v. Brussel, 279 App. Div. 859, 110 N.Y.S.2d 335; Kirby v. Kirby, 246 App. Div. 532, 282 N.Y.S. 372; Matter of Brock, 245 App. Div. 5, 13, 280 N.Y.S. 753; Matter of Jackson v. Woodner, supra; Ex parte Travis, 126 N.Y.S.2d 130, 142. The rationale for this rule is that parties should not be able to relitigate de novo issues which were fully litigated in a prior adjudication when there has been no material change in facts or circumstances determining such issues. **People ex rel. Glendenning v. Glendening, supra.**

There is no claim in this case that the New York court lacked jurisdiction to make its custody order. Therefore, the trial court was correct in holding that the Probate Court committed error by not recognizing the New York custody decree under the full faith and credit clause of the United States constitution. The Probate Court could have modified the New York custody decree only if there had been such a material change of circumstances since the decree as would warrant a redetermination of the custody order. The trial court concluded that the Probate Court erred in modifying the New York custody order because there had not been a material change of circumstances. This conclusion is amply supported by the record.

There is, accordingly, no merit to the defendant's

claim that the trial court committed error by refusing to admit evidence of transactions and occurrences which had happened before the entry of the last New York custody decree. As we have mentioned previously, the last New York custody decree is res judicata in the absence of the intervention of a material change in circumstances.

II

The defendant claims that the trial court should have permitted the children to choose their own guardian pursuant to § 45-46 of the General Statutes. There is no merit to this claim. Section 45-46 permits a minor fourteen years of age or over who has no parent or guardian of his person to choose some person to be his guardian, and the Probate Court has the power to disapprove the choice. It is clear that § 45-46 does not apply in the instant case because the two minor children both have parents by adoption.

Nor could the two children have chosen their own guardian under § 45-54 of the General Statutes. This statute provides that a court may appoint a guardian ad litem for any minor child who has an interest in legal proceedings before it. **Potter v. Alcorn, 140 Conn. 96, 99 A.2d 97.** This statute does not imply that a minor may choose a guardian of his person whenever he has an interest in legal proceedings.

III

The defendant claims that the Superior Court

erred in concluding that the Probate Court abused its legal discretion by appointing him sole guardian of the children. The basis of this claim is that the Superior Court did not admit all of the evidence which had been considered by the Probate Court and which related to the plaintiff's alleged unfitness to continue to serve as a joint guardian. We do not agree with this claim.

An appeal to the Superior Court from a decision of the Probate Court presents for redetermination both the questions of law and the questions of fact which are embraced within the order or decree appealed from. **Stevens' Appeal, 157 Conn.** (30 Conn. L.J., No. 38, pp. 15, 16); **Willard v. McKone, 155 Conn. 413, 416, 232 A.2d 322; Boschen v Second National Bank, 130 Conn. 501, 503, 35 A.2d 849; Haverin v. Welch, 129 Conn. 309, 315, 27 A.2d 791; I Locke & Kohn, Conn. Probate Practice § 186, pp. 381, 382.** In an appeal from probate, the Superior Court retries the issues de novo, and the case is not presented on a transcript of the proceedings in the Probate Court.

The Superior Court did not commit error by excluding evidence of events and occurrences which happened prior to the last New York custody decree even though it was relied on by the Probate Court. In an appeal from probate, the Superior Court can consider only evidence which would have been competent, relevant and material at the hearing in the Probate Court. **Stevens' Appeal, supra; Vivian's Appeal, 74 Conn. 257, 259, 50 A. 797.** As we have stated previously, the Superior Court correctly applied New York law by excluding evidence which was imma-

terial to prove that there had been a material change in circumstances since the last New York custody decree. The exclusionary ruling which the defendant complained of did not deprive him of any right, conferred by Connectiut law, to present such evidence at the trial de novo in the Superior Court.

Because of the view we have taken in deciding this appeal, it is unnecessary to discuss the defendant's remaining claim of error.

There is no error.

In this opinion the other judges concurred.

APPENDIX B-1

6365

Alice L. Miller
vs.
Dr. Robert B. Miller.

Supreme Court,
Middlesex County,
May 29, 1969.

MOTION TO REARGUE.

The defendant respectfully moves to reargue the appeal for the following reasons:

1. The Courts of the State of Connecticut are bound to give to the judgment of a sister state the same force and effect as it is entitled to in that sister state.

U. S. Constitution Art IV Sec. 1

2. The full faith and credit clause if applicable to custody decrees would require a state to recognize a sister state's decree only if the sister state would be bound by it.

Ford v. Ford, 371, U.S. 187, 83 S. Ct. 273

3. In New York the Full Faith and Credit Clause does not apply to custody decrees.

Matter of Bachman v. Mejias, 1 N.Y. 2d 575

4. The childs welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time.

May v. Anderson, 345 U.S. 528, 535-536

5. Where the welfare of children is concerned — courts are not so hide bound or limited that they may not depart from strict adversary concepts.

People ex rel Fields v. Kaufman
9 app Div 2d 375

6. The court is charged with the duty to do what is necessarily in the best interests of the children, mindful of their welfare and health and without being restricted by an agreement made by adults and to which the children were not parties.

Harris v. Harris, 57 misc. 2d 672

7. **Fruend v. Burns, 131 Conn. 380 40 A.2d 754; Scott v. Furrow, 141 Conn. 113, 104 Atl 20 224** — cannot be reconciled with **Dunham v. Dunham, 97 Conn. 440, 117 Atl 504; Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521,** and consequently the courts of this state must follow in this matter the rule as stated in **Bachman v. Mejias, 1 N.Y. 20**

8. The motion to reargue should be granted.

Respectfully submitted,
The Appellant-Defendant,
by SHAPERO and BINGHAM,
His Attorneys.

Of counsel,

JAMES F. BINGHAM.

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APPENDIX B-2

SUPERIOR COURT, CLERK'S OFFICE
Middlesex County
Middletown, Conn. 06457

6/6/69

Dear Sir:

In re: No. 18048 (6365) Alice L. Miller v. Dr. Robert B. Miller

"June 4, 1969: The motion by the defendant to re-argue is denied. By the Court, King, C. J."

Herbert Older, Clerk